

Stephen M. Harris , Esq. (State Bar Number: 110626)
 email: stephen@smh-legal.com
 LAW OFFICES OF STEPHEN M. HARRIS, P.C.
 6320 Canoga Avenue, Suite 1500
 Woodland Hills, California 91367
 Telephone: (818) 924-3103
 Facsimile: (818) 924-9079

Robert L. Starr, Esq. (State Bar Number: 183052)
 email: robert@starrlaw.com
 Adam M. Rose, Esq. (State Bar Number: 210880)
 email: adam@starrlaw.com
 THE LAW OFFICE OF ROBERT L. STARR, APC
 23277 Ventura Boulevard
 Woodland Hills, California 91364
 Telephone: (818) 225-9040
 Facsimile: (818) 225-9042

Attorneys for Plaintiff
 TRISH HERREMANS, individually, and on behalf
 of a class of similarly situated individuals

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

TRISH HERREMANS, individually, and
 on behalf of a class of similarly situated
 individuals,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

NO. CV14-2363 MMM(PJWx)

Assigned for All Purposes to
 the Honorable Margaret M. Morrow –
 Courtroom 780

Date: January 25, 2016
 Time 10:00 a.m.
 Courtroom: 780

Date Action Filed: March 27, 2014

**NOTICE OF MOTION AND
 MOTION FOR PRELIMINARY
 APPROVAL OF CLASS ACTION
 SETTLEMENT; MEMORANDUM
 OF POINTS AND AUTHORITIES**

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
 RECORD:

PLEASE TAKE NOTICE THAT on January 25, 2016 at 10:00 a.m., or as

1 soon thereafter as the matter may be heard in Courtroom 780 of the above-entitled
2 Court, located at 255 East Temple Street, Los Angeles, California, 90012, Plaintiff
3 Trish Herremans (“Plaintiff” or “Herremans”) will and hereby do move this Court to:

4 1. Preliminarily approve the Settlement Agreement and Release
5 (“Agreement” or “Settlement”), attached as Exhibit 1 to the Declaration of Stephen
6 M. Harris (“Harris Declaration”).

7 2. Preliminarily approve the Notice and Claim Form attached as exhibits 2-
8 3 to the Harris Declaration.

9 3. Permit the filing of Plaintiff’s Fourth Amended Complaint for
10 settlement purposes, attached as exhibit 4 to the Harris Declaration.

11 4. Conditionally certify, for settlement purposes only, a settlement class of
12 all persons throughout the United States who currently own or lease or who
13 previously owned or leased MINI (a.k.a. BMW) R55, R56, R57, R58, R59, and R60
14 vehicles, made for sale and/or lease in the U.S. market, with a production date
15 between October 2006 through November 2012 and that were sold or leased to a
16 Class Member who registered and operated the vehicle in the United States or Puerto
17 Rico.

18 3. Appoint Plaintiff as the Class Representative.

19 4. Appoint Stephen M. Harris of the Law Offices of Stephen M. Harris,
20 P.C., and Robert L. Starr of the Law Offices of Robert L. Starr, APC as Class
21 Counsel.

22 5. Set a hearing date for final approval of the class action settlement.

23 This Motion is based upon: (1) this Notice of Motion and Motion; (2) the
24 attached Memorandum of Points and Authorities in Support of Motion for
25 Preliminary Approval of Class Action Settlement; (3) the Harris Declaration, and the
26 exhibits attached thereto; (4) the [Proposed] Order Granting Preliminary Approval of
27 Class Action Settlement, filed concurrently herewith; (5) the records, pleadings, and
28 papers filed in this action; and (6) upon such other documentary and oral evidence or

1 argument as may be presented to the Court at the hearing of this Motion.

2
3 Dated: December 7, 2015

LAW OFFICES OF STEPHEN M. HARRIS,
P.C.

4
5
6 By: /s/ Stephen M. Harris
7 Stephen M. Harris
8 Attorneys for Plaintiff
9 TRISH HERREMANS,
10 individually, and on behalf of a class
11 of similarly situated individuals
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Herremans belongs to a putative nationwide class of current and former owners and lessees of certain Mini Cooper Vehicles, with a production date from October of 2006 through November of 2012, which were distributed by BMW of North America, LLC (“BMW”). She alleges that defects in the design, manufacture, and assembly of mechanical water pumps installed in the class vehicles resulted in the engine overheating and potential catastrophic engine failure of the Class Vehicles. Plaintiff further alleges that the water pump failure is due to the sealed two roll ball bearing system installed in the mechanical water pumps (“Water Pump Defect”) (Docket No 43, Third Amended Complaint [“TAC”] ¶¶ 4-8).

Plaintiff and BMW have reached a settlement of nationwide class claims subject to approval by this Court. BMW has agreed to reimburse all class members who have, or will, incur costs in connection with repairing or replacing failed mechanical water pumps. BMW’s obligations are based upon the payment and reimbursement provisions of the Agreement, more fully described below and in the Agreement attached as exhibit 1. (See, Exhibit 1 to Harris Declaration).

Plaintiff and her counsel believe the Settlement is fair and reasonable, providing class members’ similar if not superior remedies than they could otherwise have expected to receive if the case had been successfully tried, but without the delay and risks associated with trial.

Plaintiff respectfully requests that this Court review the negotiated Agreement, attached as Exhibit 1 to the accompanying Harris Declaration, and enter an order: (1) granting preliminary approval of the Settlement; (2); permitting the filing of the Fourth Amended Complaint, attached as exhibit 4 to the Harris Declaration; (3) certifying a class for settlement purposes and appointing Plaintiff as class representative and Plaintiff’s counsel as class counsel; (4) approving the parties’

1 proposed form and method of giving class members notice of the action and
 2 proposed Settlement; (5) directing that notice be given to class members in the
 3 proposed form and manner; and (5) setting a hearing on whether the Court should
 4 grant final approval of the Settlement, enter judgment, award attorneys' fees and
 5 expenses to Plaintiff's counsel, and grant incentive awards to Plaintiff.

6 II.

7 FACTS AND PROCEDURE

8 A. Named Plaintiff's Lease and Purchase of a Class Vehicle with Water 9 Pump Defect

10 Plaintiff purchased a new 2009 Mini Cooper ("Vehicle") in November
 11 of 2008. (TAC ¶ 20.) This vehicle was distributed, advertised, marketed and
 12 warranted by BMW, and bears the Vehicle Identification No.
 13 WMWMF73579TT95691. (*Id.*) In January of 2013, after a previous repair under
 14 warranty for the same problem, Herreman's Vehicle had to undergo a second repair
 15 due to the mechanical water pump leaking, and Herremans paid \$1,700 in
 16 connection with the repair. (TAC, ¶ 23.) BMW refused to pay for or reimburse
 17 Herremans for the cost of these repairs. (TAC, ¶¶ 21-22.)

18 All Class Vehicles when purchased new came with a New Car Limited
 19 Warranty covering defects in the materials and workmanship for a period of 50,000
 20 miles or four (4) years, whichever occurs first. (TAC, ¶ 47.)

21 B. Class Members Similar Experience

22 BMW has furnished Plaintiff with information relating to mechanical water
 23 pump failures in California, where most Vehicles are sold. (Harris Declaration, ¶ 13.)

24 During October of 2006 to November of 2012, BMW utilized a thermoplastic
 25 housing on the water pump in the Class Vehicles. During this time period, paid
 26 warranty and goodwill claims of California owners of Mini Vehicles (with plastic
 27 housing on the water pump) were approximately 7.5% all such Vehicles sold in
 28 California. In 2013 to 2014, after BMW began producing Class Vehicles with an

alloy Water pump, Warranty claims for Mini vehicles relating to water pump failure plunged to approximately 1% of or less of vehicles sold in California.¹ To date, BMW has spent \$3,800,374.28 in warranty and goodwill repairs associated with vehicles experiencing failure of the mechanical water pump. (This entails approximately 9,421 claims granted under warranty or good will.) (See, Harris Declaration, ¶¶ 14-15.)

C. Plaintiff's Allegations in TAC Regarding the Water Pump Defect

The Class Vehicles are equipped with the mechanical water pump, which circulates water throughout the engine. (TAC ¶¶ 3-4.) The mechanical water pump is bolted to the engine block. (*Id.*) The mechanical water pump contains a metal shaft. (*Id.*, ¶ 4.) One side of the metal shaft is connected to a pulley which is driven by the engine. The pulley spins, causing the metal shaft to spin. The other side of the metal shaft is connected to an impeller, which is used to circulate water throughout the engine. (*Id.*) A sealed bearing is used to connect the metal shaft to the rest of the mechanical water pump. The sealed bearing allows the metal shaft to spin while still being connected to the rest of the mechanical water pump, and also acts as a barrier in order to prevent water from leaking from the mechanical water pump. (*Id.*)

The original mechanical water pump installed in the Class Vehicles used a two row ball bearing system, with the ball bearings being encased in two ball bearing cages. The cages were then encased in a sealed bearing system. This bearing system would allow the metal shaft to spin, while the remainder of the mechanical water pump would remain bolted to the engine. This would in turn spin the impeller, which

¹ See *US. v. General Motors Corp.*, 518 F.2d 420,427 (C.A.D.C. 1975) (defect exists where a significant (i.e., non-"de minimus") number of failures occur); *U.S. v. Ford Motor Corp.*, 453 F. Supp. 1240, 1243, 1246 (D. D.C. 1978) (finding existence of defect based on replacement-part sales data); *United States v. Ford Motor Co.*, 421 F. Supp. 1239, 1241-42 (D.D.C. 1976) (existence of defect based on warranty return rate of 2%); *United States v. General Motors Corp.*, 417 F. Supp. 933, 938 (D.D.C. 1976) (GM stipulates that 300 fires in population of 375,000 vehicles constituted a significant number on which to base finding of defect), *aff'd*, 565 F.2d 754 (D.C. Cir. 1977).

1 would circulate water throughout the engine. (*Id.*)

2 The amount of stress placed on the sealed bearing system by the drive
3 pulley exceeds the engineering limitations of the two row ball bearing design. As a
4 result, the sealed two roll ball bearing system installed in the mechanical water
5 pumps has experienced a very high failure rate, and is unreliable. When the two
6 row ball bearing system fails, the mechanical water pump leaks, makes noise, and
7 the metal shaft can also stop rotating. (*Id.*)

8 When a mechanical water pump leaks a sufficient amount of water, or when
9 the metal shaft stops spinning, this results in engine overheating “the Water Pump
10 Defect”. With regard to the mechanical water pumps leaking, and with regard to the
11 metal shaft ceasing, this poses a serious safety hazard, because if this problem is
12 not remedied, it will result in an affected Class Vehicle’s engine overheating.
13 When an engine overheats while it is being driven, this results in catastrophic
14 engine failure. Catastrophic engine failure while a Class Vehicle is being driven in
15 traffic poses a serious safety hazard. When the engine of a Class Vehicle fails to
16 function while the Class Vehicle is being driven in traffic, the affected Class
17 Vehicle loses the ability to accelerate. Furthermore, the affected Class Vehicle’s
18 steering and braking abilities are severely diminished, due to the power braking and
19 power steering system not being able to properly function. (*Id.*, ¶¶ 5-6.)

20 BMW did not dispute the fact that the mechanical water pumps failed, but
21 instead argued that this was due to the composition of the mechanical water pump.
22 BMW states that a change of design in the pump, to use an alloy cover rather than a
23 plastic one, was followed by the dramatic decline in the failure rate outlined above.
24 (Harris Declaration, ¶¶ 9, 14-15.)

25 The Class Vehicles consist of MINI R55, R56, R57, R58, R59, and R60
26 vehicles, with a production date from October of 2006 through November 2012, as
27 more fully described in the Agreement. (Agreement § I, ¶¶ 10-16.) Approximately
28 165,000 Class Vehicles were sold in California. (Harris Declaration, ¶¶ 14-15.) The

1 majority of Class Vehicles were sold in California. (Harris Declaration, ¶ 13.)

2 The costs of the Water Pump Defect to consumers can be and often are
3 exorbitant, because consumers have been and will continue to be required to pay
4 hundreds if not thousands of dollars both to diagnose and repair the damages
5 caused by the Water Pump Defect. Additionally, the presence of the Water Pump
6 Defect in the Class Vehicles has resulted in the vehicles having diminished value,
7 thereby depriving Plaintiff and the Class Members of the benefit of the vehicle (and
8 its value) that they paid for. (TAC, ¶ 8.)

9 Plaintiff alleges BMW was aware of the Water Pump Defect before Plaintiff
10 purchased her Class Vehicle through sources not available to plaintiff or Class
11 Members, including but not limited to internal testing, consumer complaints,
12 Technical Service Bulletins, prior water pump design experience, the redesign of the
13 water pump system, aggregate data from BMW's dealers (such as warranty data,
14 goodwill data, repair data and parts purchases), reports from the National Highway
15 Transportation and Safety Administration ("NHTSA"), and from other internal and
16 external sources. (TAC, ¶¶ 10, 12-13, 15-18.)

17 Warranty and goodwill claims of owners of Mini vehicles with this design of
18 the Water Pump (all class vehicles) dramatically rose to approximately 7.5% of all
19 Class Vehicles sold in California, which is where the bulk of MINI vehicles were
20 sold. Indeed, to date, BMW has spent over 3.8 million dollars reimbursing its
21 customers in California for warranty and goodwill claims relating to the failure of the
22 mechanical water pump. (This entails approximately 8,800 claims granted under
23 warranty or good will up to 2012, and a total of over 9,400 claims through 2014.)
24 (See, Harris Declaration, ¶¶ 9, 13-15.)

25 Despite BMW being on notice of the defect from various internal and external
26 sources, BMW has not recalled the Class Vehicles to repair the Water Pump Defect,
27 has not offered all of the owners and lessees of Class Vehicles a suitable permanent
28 repair free of charge, and has not offered to reimburse all owners and lessees of Class

1 Vehicles who incurred costs relating to the Water Pump Defect, including costs
2 related to inspections/diagnosis, and repair of the Class Vehicles. (TAC, ¶¶ 55-59.)

3 **D. The Class Action Complaint Against BMW**

4 On March 27, 2014, Herremans brought a class action against BMW on behalf
5 herself and a class of California consumers alleging (1) violations of California
6 Consumer Legal Remedies Act, (2) violations of California Unfair Business
7 Practices Act, and (3) fraud. (Docket No. 1.) After the filing of the First Amended
8 Complaint, BMW brought a motion to dismiss, which was opposed by Herremans.
9 The court granted the motion, with leave to amend. (Docket No. 30.)

10 Herremans then filed a Second Amended Complaint. BMW again brought a
11 motion to dismiss, which was opposed by Herremans. The court again granted the
12 motion, with leave to amend. (Docket No. 42.) Herremans then filed a third amended
13 complaint on March 11, 2015. (Docket No. 43.) BMW declined to file another
14 motion to dismiss, and instead agreed to participate in a mediation. (Harris
15 Declaration, ¶ 5.) BMW filed its answer to operative complaint on March 25, 2015.
16 (Docket No. 47.)

17 **E. Investigation And Discovery**

18 Plaintiff conducted a pre-filing and post-filing investigation, including, but not
19 limited to, retaining an expert consultant regarding water pump failures, detailed
20 analysis of the design of the mechanical water pump in existence prior to the change
21 of the design by BMW, review of technical service bulletins, review of publicly
22 available information relating to the nature and extent of the mechanical water pump
23 problem, and obtaining and reviewing approximately 3,000 pages of documents
24 produced by BMW in response to Plaintiff's formal discovery requests. Plaintiff
25 monitored complaints on NHTSA, reviewed data concerning MINI sales, and
26 obtained informally from BMW sales data, warranty and good will claims data, call
27 center records, PUMA records (relating to customer complaints), as well as design
28 data. (Harris Declaration, ¶¶ 11-13.)

F. The Mediation/Settlement Agreement

On May 19, 2015, the parties participated in a full day mediation session with the honorable Edward A. Infante. The parties were able to agree on all aspects of the settlement (other than attorneys' fees, costs, and enhancement) after this mediation session, including agreement to a nationwide class for settlement purposes only, and signed a document titled "Herrreman's Settlement Matrix" after the conclusion of these negotiation sessions. After the mediation, the parties negotiated the attorneys' fees, costs, and the enhancement amount and ultimately agreed to these terms in July of 2015. (Harris Declaration, ¶¶ 16-17.)

Thereafter, the parties negotiated the formal settlement agreement, notice and claim form. The parties were able to come to final agreement regarding the terms of these documents in November of 2015. The one issue the parties cannot agree to is whether it is appropriate to refer to the web site of counsel for Plaintiff in the notice and claim form, or whether the only web site which should be identified is the claims administrator's. (Harris Declaration, ¶¶ 18-19.)

As part of the settlement, Plaintiff submits a proposed Fourth Amended Complaint, to be filed consistent with the settlement, and asserting claims on a nationwide basis. (Harris Declaration, ¶ 20.)

The court granted several extensions of time for Plaintiff to file a class certification motion, or this motion for preliminary approval, while the parties continued with their negotiations. (See, Docket No.'s 48, 53, and 55.) Ultimately, the court granted the stipulation of the parties to have the motion filed and heard on the present date. (See, Dockets No.'s 56-57.)

G. The Proposed Settlement

1. The Proposed Settlement Class

The settlement class consists of "all residents in the United States (including Puerto Rico), who currently own or lease or previously owned or leased, a Class Vehicle" ("Settlement Class"). (Agreement, § I, ¶ 10.) Excluded from the Settlement

Class are the following: “(1) MINI [BMW], its related entities, parent companies, subsidiaries and affiliates, and their respective officers, directors, and employees; (2) insurers of the Class Vehicles; (3) all persons and/or entities claiming to be subrogated to the rights of Class Members; (4) issuers or providers of extended vehicle warranties or extended service contracts; (5) individuals and/or entities who validly and timely opt-out of the Settlement; (6) consumers or businesses that have purchased Class Vehicles previously deemed a total loss (i.e. salvage) (subject to verification through Carfax or other means); (7) current and former owners of a Class Vehicle who previously have released their claims against MINI with respect to the issues raised in the Litigation; (8) United States and Puerto Rico residents who have purchased Class Vehicles in the United States but have since transported the vehicle outside the United States for permanent use abroad; (9) any current or former owner or lessee of a Class Vehicle that has received or obtained a goodwill or warranty replacement of a Water Pump (unless the consumer had to pay or share in some portion of the cost of a goodwill replacement); (10) any judge to whom this matter is assigned, and his or her immediate family (spouse, domestic partner, or children); (11) individual or entities that have purchased and/or leased Class Vehicles as “fleet” vehicles (i.e. rentals or company vehicles); and (12) Class Vehicles that were involved in accidents that resulted in damage and subsequent need to replace a Water Pump.” (*Id.*)

2. The Proposed Payment and Reimbursement Schedule

BMW’s warranty normally extends only to four years or 50,000 miles, whichever comes first. (Harris Declaration, ¶ 23.) Here, the Settlement permits class members to obtain reimbursement for out of pocket payments for past or future water pump repairs up to seven years after the vehicle is first placed in service, or up to 84,000 miles on the odometer, whichever occurs first. (Agreement, § I, ¶¶ 28, 38, 40, and §, ¶¶ A and B.)

A water pump repair under the settlement includes repair or replacement of the

1 water pump, coolant, bolts, and gasket following a water pump failure, and
2 reasonable labor costs for repair. (*Id.*, § I, ¶ 40.) The maximum amount a class
3 member shall be reimbursed for a water pump repair is \$500. (*Id.*, ¶ 25.) In contrast,
4 the data BMW has furnished relating to the cost of the warranty and good will claims
5 paid to date establishes that the average cost of a water pump repair is \$388.94.
6 (Harris Declaration, ¶ 10.)

7 **3. The Proposed Notice to the Class and Others of the Settlement**

8 A Settlement Administrator is to be appointed under the Agreement who will
9 disseminate notice of the Settlement and the hearing on a Final Approval Motion
10 (see, Exhibit 2 of the Harris Declaration; Agreement §I, ¶ 9, § V). Notice will be sent
11 by First-Class U.S. Mail, postage paid, to potential Settlement Class members,
12 including current and prior owners and lessees of Class Vehicles. The procedure for
13 giving notice to potential Settlement Class members is set forth in Section I,
14 Paragraph 26 and Section IV, paragraphs A-E, of the Agreement. In addition to mail
15 notice, the settlement administrator will maintain a toll free number and web site
16 dedicated to advising Class Members about the Settlement. (*Id.*) The web site, notice
17 and toll free number will also include Class Counsel's contact data so that Class
18 Members may contact Class Counsel and obtain their assistance with any questions
19 they may have. (*Id.*)

20 Class members will have 90 days to submit a claim from the date of
21 transmission of the notice, and can do so via mail, email, or facsimile. (Agreement,
22 § I, ¶¶ 2, 26; §§ IV-V; Ex.'s 2-3 to Harris Declaration.) Class members who
23 experience a water pump failure after the effective date of the settlement can have a
24 repair performed by BMW, which will cover 100% of the costs during the warranty
25 period provided for in the settlement. (Agreement, § I, ¶¶ 19, 38; § III, ¶ B.) Class
26 members can also appeal denial of their claims. (Agreement, § V, ¶ F.)

27 The Settlement Agreement, at Section VI, establishes the procedure for those
28 potential Settlement Class members who wish to be excluded from the settlement;

1 Section VII establishes the procedure for those potential Settlement Class members
2 who wish to object to the settlement.

3 **4. The Proposed Release of the Class**

4 Class Members who do not opt out of the Settlement according to the
5 procedures set forth in the Settlement Agreement shall release any and all claims
6 (including unknown claims) or causes of action that were, or could have been,
7 asserted by Plaintiff or any Class Members against BMW, regarding the Water Pump
8 or Water Pump Repair on Class Vehicles as alleged in the Action (excluding
9 potential claims for personal injury, property damage or claims for subrogation).
10 (Agreement, § VIII, ¶ 5.)

11 **5. Attorneys' Fees, Costs and Enhancements**

12 The Agreement contains provision relating to class counsel's attorneys' fees
13 and costs, as well as the recommended enhancement payment. (*Id.*, § IX.)

14 **III.**

15 **ARGUMENT**

16 **A. The Proposed Class Action Settlement Should Receive Preliminary**
17 **Approval**

18 **1. Overview of the Class Action Settlement Process and the Role of**
19 **Preliminary Approval**

20 A class action settlement like the one proposed here must be approved by the
21 Court to be effective. *See* Fed. R. Civ. Proc. 23(e). Court approval occurs in three
22 steps: (1) a preliminary approval hearing, at which the court considers whether the
23 proposed settlement is within the range of reasonableness meriting final approval; (2)
24 a notice and comment stage, during which class members are informed about the
25 proposed settlement and given an opportunity to object; and (3) a "formal fairness
26 hearing," or final approval hearing, at which the court decides whether the proposed
27 settlement should be approved as fair, adequate, and reasonable to the class. *See*
28 *Manual for Complex Litigation (Fourth)* §§ 21.632-34 (2004).

Whereas at the final approval stage the Court must decide whether the parties negotiated a settlement that is fair, reasonable, and adequate to class members, at the preliminary approval stage, the Court need only decide whether the settlement falls within a range of reasonableness possibly meriting final approval (i.e., whether it would be worthwhile to give the class notice of the settlement and proceed with a formal fairness hearing). *See Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); *Acosta v. Trans Union*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (“To determine whether preliminary approval is appropriate, the settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out.”); 4 Newberg & Conte, § 11.25. If the settlement has no obvious deficiencies, then it falls within the range of possible approval. *See In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005). In other words, the Court makes only a preliminary determination of the settlement’s fairness, reasonableness, and adequacy, pointing out any settlement terms that are so unacceptable at the outset that a formal fairness hearing would be a waste of time. *See Manual for Complex Litigation*, § 21.632; 4 Newberg & Conte, § 11.25.

Plaintiff asks the Court to take the first step in the settlement approval process and grant preliminary approval of the Settlement. Plaintiff further requests that the Court provisionally certify the Settlement Class, appoint Plaintiff as Class Representative and her attorneys as Class Counsel, order dissemination of notice to Class Members, and set a date for the final approval hearing.

2. The Proposed Settlement Is Well Within the Range of Reasonableness Warranting Preliminary Approval and Justified in Light of the Risks of Continued Litigation

The settlement presented by the parties contains no obvious deficiencies and

1 does not provide for excessive attorneys' fees at the expense of the class. Indeed, as
2 its terms were negotiated at arm's length by experienced counsel² knowledgeable in
3 complex class litigation, and with the assistance of a retired United States District
4 Court Judge, the settlement enjoys a presumption of fairness. *See, e.g., In re*
5 *Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-174 (S.D.N.Y.
6 2000). "Once the Settlement is presumed fair, it is not for the Court to substitute its
7 judgment as to a proper settlement for that of such competent counsel." *Id.* (internal
8 quotes omitted).

9 An objective evaluation confirms that the benefits negotiated for the class are
10 well within the range of reasonableness. It follows that the class is now receiving,
11 through a settlement, nearly as much as could reasonably be expected after a
12 successful trial verdict. The alternative would be protracted litigation that would
13 leave class members uncompensated, and many completely unaware that their
14 vehicles suffer from a Water Pump Defect, a problem which poses of a risk of the
15 vehicles coming to a stop on the road or highway.

16 If the parties had been unable to resolve this case through settlement, the
17 litigation could have been even more expensive and lengthy. For instance, in a case
18 against General Motors alleging a defect in an intake manifold gasket, another
19 plaintiffs' counsel devoted more than 58,000 hours over five years before resolving
20 the cases for cash reimbursements through a claims-made process. *In Re General*
21 *Motors Dex-Cool Cases*, No. HG03093843 (Cal. Super Ct. Alameda County 2008).

22 The reality is that any case against a major automotive manufacturer alleging a
23 defect in thousands of vehicles has the potential to take up significant amounts of the
24 Court's and the parties' resources. In addition, if the case were to proceed, Plaintiff
25 would need to retain multiple experts resulting in significant additional expenses.

26 It goes without saying that BMW would strongly oppose class certification

27 ² See, Harris Declaration, ¶¶ 16-17, 22-24.
28

were the case to proceed on the merits. “The value of a class action ‘depends largely on the certification of the class,’ and . . . class certification undeniably represents a serious risk for plaintiffs in any class action lawsuit.” *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 817 (3d. Cir. 1995)). As explained herein, Plaintiff’s counsel believe that this case is appropriate for class certification in the litigation context. However, there is always a risk that a Court would not find this action suitable for certification as a nationwide class or a multi-state class, or, even if class certification were granted in the litigation context, class certification can always be reviewed or modified before trial, and a class may be decertified at any time. *See, e.g., Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (the Ninth Circuit reversed the certification of a nationwide class composed of consumers seeking relief under California’s consumer protection laws); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Given the favorable terms of the settlement and the manner in which these terms were negotiated, the proposed settlement should be viewed, at least preliminarily, as a fair, reasonable, and adequate compromise of the issues in dispute. It is worthwhile for the Court to grant preliminary approval to the settlement, order dissemination of notice to the class for comment, and proceed to a formal fairness hearing.

B. Conditional Class Certification Is Appropriate for Settlement Purposes

1. The Proposed Class Meets the Requirements of Rule 23

Before granting preliminary approval of the Settlement, the Court should determine that the proposed settlement class meets the requirements of Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); Manual for Complex Litigation, § 21.632. An analysis of the requirements of Rule 23(a) and 23(b)(3), commonly referred to as numerosity, commonality, typicality, adequacy, predominance, and superiority, shows that certification of this proposed settlement

1 class is appropriate.

2 **2. The Proposed Class Is Sufficiently Numerous and Ascertainable**

3 The numerosity requirement is met where “the class is so numerous that
4 joinder of all members is impracticable.” Fed. R. Civ. P. 23(a) (1). Generally, courts
5 will find a class sufficiently numerous if it consists of 40 or more members. *Vasquez*
6 *v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009)
7 (numerosity is presumed at a level of 40 members); *Consolidated Rail Corp. v. Town*
8 *of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (“numerosity is presumed at a level of
9 40 members”); *Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th
10 Cir. 1969) (numerosity satisfied with class of 40 individuals); *Ikonen v. Hartz*
11 *Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1998) (finding a purported class of
12 40 members sufficient to satisfy numerosity).

13 Here, the proposed settlement class consists of all current and former owners
14 and lessees within the United States (including Puerto Rico) with over 164,000 Class
15 Vehicles sold in California alone.

16 **3. There are Questions of Law and Fact that Are Common to the**
17 **Class**

18 The second Rule 23(a) requirement is commonality, which is satisfied “if there
19 are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a) (2). The
20 “commonality requirement has been ‘construed permissively,’ and its requirements
21 deemed minimal.” *Estrella v. Freedom Fin’l Network*, 2010 U.S. Dist. LEXIS
22 61236 (N.D. Cal. 2010) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-
23 1020 (9th Cir. 1998). Moreover, “‘there is clear justification for handling the dispute
24 on a representative rather than an individual basis’ if ‘common questions present a
25 significant aspect of the case and they can be resolved for all members of the class in
26 a single adjudication....’” *Mazza*, 666 F.3d at 589 (quoting *Hanlon*, 150 F.3d at
27 1022).

28 Here, each Class Member purchased or leased class vehicles. BMW contends

that the vehicles manufactured with the mechanical water pump are no more susceptible to catastrophic failure than other vehicles, and thus perform appropriately under normal driving conditions. It follows that the principal common questions of law and fact which a trier of fact would need to resolve are whether the Mechanical Water Pumps are defective, and if so, whether BMW had an obligation to apprise consumers of the defect and make repairs relating to the defect at no cost to the consumer. The need to determine whether an inherent defect exists not only satisfies Rule 23's commonality requirement, it raises the very type of overarching common question that has driven class certifications in other automotive defect cases. *See, e.g., Hanlon*, 150 F.3d at 1020 (allegedly defective rear liftgate latches); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 595-97 (C.D. Cal. 2008) (allegedly defective flywheels); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004) (allegedly defective engine intake manifolds); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. Ohio 2006) (allegedly defective throttle body assembly); *see also Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1172 (9th Cir. 2010) (reversing denial of class certification in a case regarding allegedly defective tire alignment).

4. Plaintiff's Claims are Typical of the Proposed Settlement Class

"Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon*, 150 F. 3d at 1020). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff." *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007). Thus, typicality is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol v. Giuliani*, 126 F.3d 372, 376 (2nd Cir. 1997)).

1 Here, Plaintiff asserts that Class Members' claims arising from the Mechanical
2 Water Pump failures are reasonably coextensive with the legal claims asserted by the
3 named Plaintiff. Each Class Member's claim arises from the same underlying
4 conduct-namely, BMW's alleged concealment of an inherent defect in the
5 Mechanical Water Pumps installed in the MINI Class Vehicles. In addition, Class
6 Members have similar interests in the remedies being provided by the proposed
7 settlement, which include reimbursements for replacing the water pumps and repairs
8 associated with their failure.

9 **5. Plaintiff and Plaintiff's Counsel Will Adequately Represent the**
10 **Interests of the Proposed Settlement Class**

11 The final Rule 23(a) requirement asks whether "the representative parties will
12 fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a) (4).
13 This requirement is satisfied if: (1) the proposed representative Plaintiffs do not have
14 conflicts of interest with the proposed class, and (2) Plaintiffs are represented by
15 qualified and competent counsel. *Hanlon*, 150 F.3d at 1020.

16 Here, the proposed representative Plaintiff does not have individual interests in
17 this litigation that conflict with the best interests of the class. To the contrary,
18 Herremans and each Class Member have a common interest in obtaining
19 reimbursement from BMW as a result of its alleged concealment of the Water Pump
20 Defect. In addition, the named Plaintiff is represented by counsel well versed in
21 prosecuting automotive class actions, and other class actions.

22 While the Court usually must speculate to some extent in assessing whether
23 the named plaintiff and her counsel will adequately represent the class, in this case
24 the Court can look to the proposed settlement negotiated by Plaintiff and her counsel.
25 The settlement provides fair compensation for Class Members' claims by providing
26 them with reimbursement for repairs to their Class Vehicles relating to water pump
27 failures.

1 **6. Common Issues Predominate Over Individual Issues**

2 “In addition to meeting the conditions imposed by Rule 23(a), the parties
3 seeking class certification must also show that the action is maintainable under Fed.
4 R. Civ. P. 23(b) (1), (2) or (3).” *Hanlon*, 150 F.3d at 1022. Here, the proposed class
5 is maintainable under Rule 23(b) (3), as common questions predominate over any
6 questions affecting only individual members and class resolution is superior to other
7 available methods for a fair resolution of the controversy. *Id.* (citing Fed. R. Civ. P.
8 23(b) (3)).

9 Each class members’ claims depends on whether his/her/its Class Vehicle
10 suffers from an inherent Water Pump Defect, and thus raise just the sort of
11 predominantly common questions courts have found to justify class treatment. *See*,
12 e.g., *Hanlon*, 150 F.3d at 1022-1023 (allegedly defective rear lift gate latches);
13 *Chamberlan*, 223 F.R.D. at 526 (allegedly defective engine intake manifolds);
14 *Daffin*, 458 F.3d at 552 (allegedly defective throttle body assembly). Moreover,
15 proof of the manifestation of the defect is not a prerequisite to class certification.
16 *Wolin*, 617 F.3d at 1173.

17 Preliminary approval is not precluded by *Mazza*, where after analyzing
18 governmental interests, the court denied certification “[u]nder the facts and
19 circumstances of [the] case,” holding “that each class member’s consumer protection
20 claim should be governed by the consumer protection laws of the jurisdiction in
21 which the transaction took place.” *Mazza*, 666 F.3d at 594. In *Mazza*, plaintiffs’
22 claims against a vehicle manufacturer were for false advertising. “Thus, *Mazza*
23 stands for the unremarkable proposition that it is difficult to certify a class where the
24 class members are not all exposed to the same representations. This proposition has
25 no relevance to [a] case, where Plaintiffs’ theory is that Defendant’s *omissions*
26 violated the [states’ consumer statutes] and that partial representations *on the product*
27 *itself* are misleading.” *Tait v. BSH Home Appliances Corp.*, SA CV 10-0711 DOC,
28 2012 WL 6699247 (C.D. Cal. Dec. 20, 2012) (Emphasis in original). Here too,

1 Plaintiff's theory (set forth in the proposed amended complaint) is that BMW's
2 failure to disclose the existence of the Water Pump Defect violated unfair and
3 deceptive acts and practice laws of each state. In addition, the claims for breaches of
4 express warranty and implied warranty of merchantability are based upon the same
5 facts pertaining to each Class Member. Importantly, with respect to the warranty
6 claims occurring within warranty, Class Members will not need to show that any
7 particular warranty was delivered or made to them by BMW in order to be
8 reimbursed under the Settlement Agreement. They need merely show proof of water
9 pump failure resulting in out of pocket costs for repair and replacement arising out of
10 said failure to a Class Vehicle occurring within the time and mileage limitations of
11 the settlement.

12 **7. Class Settlement Is Superior to Other Available Means of**
13 **Resolution**

14 Similarly, there can be little doubt that resolving all Class Members' claims
15 through a single class action is superior to a series of individual lawsuits. "From
16 either a judicial or litigant viewpoint, there is no advantage in individual members
17 controlling the prosecution of separate actions. There would be less litigation or
18 settlement leverage, significantly reduced resources and no greater prospect for
19 recovery." *Hanlon*, 150 F.3d at 1023. Indeed, the terms of the Settlement negotiated
20 on behalf of the class demonstrates the advantages of a collective bargaining and
21 resolution process.

22 Addressing the allegations of an inherent defect in the design of the Class
23 Vehicles' mechanical water pumps through a class action is superior to individual
24 litigation or any alternative methods that may exist. This action was filed precisely
25 because Plaintiff believed those alternatives, such as filing complaints with NHTSA
26 or directly with BMW, would have proven ineffective in addressing the problem on a
27 class-wide basis. Although the repair costs expended by consumers are not
28 insignificant, costing an average of \$388.94, the amount in controversy is not nearly

1 enough to incentivize individual action. See *Wolin*, 617 F.3d at 1175 (“Where
2 recovery on an individual basis would be dwarfed by the cost of litigating on an
3 individual basis, this [superiority] factor weighs in favor of class certification.”). As
4 the Ninth Circuit found in the *Wolin* automotive defect case, “[f]orcing individual
5 vehicle owners to litigate their cases, particularly where common issues predominate
6 for the proposed class, [would be] an inferior method of adjudication.” *Id.* at 1176.
7 “There would be less litigation or settlement leverage, significantly reduced
8 resources and no greater prospect for recovery.” *Hanlon*, 150 F.3d at 1023. The
9 superiority of proceeding through the class action mechanism, on the other hand, is
10 demonstrable. By aggregating Class Members’ claims, Plaintiff’s counsel have been
11 able to expend the resources necessary to conduct discovery of the alleged Engine
12 Defect and negotiate a settlement with BMW that, if approved, will provide Class
13 Members with reimbursements for their repair costs. As the class action device
14 provides the superior means to effectively and efficiently resolve this controversy,
15 and as the other requirements of Rule 23 are each satisfied, certification of the
16 settlement class proposed by the parties is appropriate.

17 **C. The Proposed Notice Plan Meets the Requirements of Rule 23**

18 Upon certifying a 23(b)(3) class, Rule 23(c)(2)(B) requires the Court to “direct
19 to class members the best notice that is practicable under the circumstances,
20 including individual notice to all members who can be identified through reasonable
21 effort.” In addition, Rule 23(e) (1) requires that before a proposed settlement may be
22 approved, the Court “must direct notice in a reasonable manner to all class members
23 who would be bound by the proposal.”

24 The parties have agreed on a notice plan that satisfies the requirements of Rule
25 23. Under this plan, BMW will cause to be mailed notice of class certification and
26 the proposed settlement to all current and former owners and lessees of class vehicles
27
28

1 who can be reasonably identified.³ The form of the notice to be mailed, attached as
2 Exhibit 2 to the Harris Declaration, includes all the content required by Rule 23(c)
3 (2) (B), such as a description of the action and class claims, as well as the Class
4 Members' right to opt out or object to the proposed settlement, including any
5 application for attorneys' fees, costs and service awards.

6 **1. It Is Appropriate To Refer To Class Counsel's Web Site In The**
7 **Settlement Documents**

8 The one issue the parties cannot agree to is whether it is appropriate to refer to
9 the web site of counsel for Plaintiff in the notice and claim form, or whether the only
10 web site which should be identified is the claims administrator's. Plaintiff contends
11 that her counsel should be able to reach out to class members and communicate with
12 them, as class counsel, to encourage them to make claims, and answer their
13 questions. Thus, it is appropriate to refer to the settlement web site of Plaintiff's
14 counsel for this purpose, in the settlement documents, so that class members can
15 readily address their questions to counsel for Plaintiff and so that counsel for Plaintiff
16 can encourage all eligible class members to make claims.

17 Plaintiff urges the court to permit Plaintiff's counsel to communicate with
18 class members effectively, for the purpose of encouraging them to claim settlement
19 benefits for which they are eligible.

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26 ³ Moreover, the Agreement also provides for a web site and toll free number to be
27 maintained in order to notify the Class Members about the Settlement, and to answer
28 questions that they may have.

1 **IV. CONCLUSION**

2 The Parties have negotiated a fair and reasonable settlement that almost
3 certainly never would have been arrived at but for the use of a class action as a
4 procedural device, a dedicated and informed Class Representative and experienced
5 Plaintiff's counsel. Preliminary Approval should thus be granted.

6 Dated: December 7, 2015

LAW OFFICES OF STEPHEN M. HARRIS,
7 P.C.

8
9 By: /s/ Stephen M. Harris
10 Stephen M. Harris
11 Attorneys for Plaintiff
12 TRISH HERREMANS,
13 individually, and on behalf of a class
14 of similarly situated individuals
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